(b) he received a letter from Ove Arup dan Rakan2, in which he was warned of the existence of a patent and told that he would use his material at his own risk;

(c) there was no reference by any of those concerned to the section under which a government department can authorize such use. I consider that, where private rights are to be affected in this manner, the exercise of such a power should be identified, if it is to be effective, and not merely inferred from the fact that the rights were infringed on behalf of a department which had a right to take such action if it chose to exercise it.

I do not express any view as to the extent of the right of the Crown at common law to use patented inventions without the consent of the patentee and without compensation, other than to observe that the defendant might find himself in difficulty, in view of *Dixon* v. *London Small Arms Company*.(3)

At the end of this application, I ordered the plaintiffs to give security for costs in the sum of $34,000. The costs of this application shall be costs in the cause.

Order accordingly.

Solicitors: *Advani Hoo Morris & Lal; David Clidero & Co.; Choo Chan & Wong.*

LITA MADDOX v. THE NETHERLANDS INSURANCE CO. (EST. 1845) LTD.

[O.C.J. (Roberts C.J.) February 9 & 12, 1987]

[Bandar Seri Begawan – Suit No. 240 of 1986]

Insurance – Motor insurance policy – Third party liability – Exception to liability – Fatal accident to passenger – Passenger and driver – Employed by insured – Whether death in the course of employment – Whether death by reason of or in pursuance of a contract of employment – Whether insurer liable to indemnify insured – Motor Vehicles (Third Party Risks) Act (Cap. 90).

The issue for decision in this case is whether the defendant insurance company is relieved of liability to pay to the plaintiff the judgment sum of $172,191.10 with interest and costs obtained by the plaintiff against Wilco Electronics (B) Ltd. ("Wilco") in Suit No. 245 of 1985 on June 14, 1986. Wilco were the owners of a motor vehicle No. BB163 covered by a motor insurance policy issued by the defendant against risks therein specified including liability to third parties. The policy contained the following exceptions to the defendant's liability to third parties:

"The company shall not be liable in respect of –

(i) .....

(ii) death of or bodily injury to any person in the employment of the insured arising out of and in the course of such employment;

(iii) death of or bodily injury to any person (other than passenger carried by reason of or in pursuance of a contract of employment) being carried in or upon entering or getting on to or alighting from the motor vehicle at the time of the occurrence of the event out of which any claim arises."

On September 6, 1982, at Mile 15, Jalan Seria/Tutong, while Galdones, the deceased, was a passenger in vehicle BB163, driven by Guinto, an accident involving BB163 occurred resulting in the death of the deceased and injury to Guinto. Both the deceased and Guinto were the employers of Wilco at the material time. Guinto had a valid driving licence and the insurance policy was in force. The plaintiff has not received any payment under the judgment in the said Suit No. 245 of 1985 and now brings this action under the Motor Vehicles (Third Party Risks) Act (Cap. 90) to enforce the order of Hooper J. against the defendant as insurer of BB163.

The learned Chief Justice found that when the deceased and Guinto were driving from Bandar Seri Begawan to Seria, they were travelling to work, but were not, at the time of the collision, on duty. To succeed in its defence, the defendant must establish either (a) that the death of the deceased arose out of and in the course of his employment by Wilco; or (b) that the deceased was a passenger in the vehicle and that he was not a passenger "carried by reason of or in pursuance of a contract of employment".

Held: (1) the deceased was not acting in the course of his employment when he was killed;

(2) it was open to the court to find that the deceased was travelling by reason of his contract of employment, even though not in the course of his employment;

(3) the deceased fell within the bracketed exception to exclusion (iii), so that the defendant is not relieved of liability thereby. In the result, the defendant's liability under the policy with Wilco to indemnify the latter is not excluded by either of the exceptions to section 11 of the contract;

(4) there must be judgment for the plaintiff for $172,191.10 plus interest at 6% from date of death until date of judgment, with costs.

Cases referred to:

(1) *St. Helens Colliery Co. Ltd.* v. *Hewitson* [1924] A.C. 59.

(2) *Weaver* v. *Tredegar* [1940] *Iron and Coal Co. Ltd.* A.C. 955.

(3) *Vandyke* v. *Fender* [1970] 2 All E.R. 335, 340; [1970] 2 Q.B. 292.

(4) *Izzard* v. *Universal Insurance Company Ltd.* [1937] A.C. 773.

(5) *Tan Keng Hong* v. *New India Assurance Co. Ltd.* [1978] 1 M.L.J. 97 (P.C.)

(6) *Nottingham* v. *Aldridge & Anor.* [1971] 2 All E.R. 751; [1971] 2 Q.B. 739.

CIVIL SUIT.

S.P. Wong (*Andrew Ong* with him) for the plaintiff.

Vinod Kumar (*Lee Yew Choh* with him) for the defendant.

Cur. Adv. Vult.

Roberts C.J.: *Agreed facts:* I have much been assisted by the good sense of counsel, in producing the following detailed statement of agreed facts, which has greatly narrowed the issues which I have to decide.

(1) Wilco Electronics (B) Ltd. (hereinafter referred to as "Wilco") were (are) the owners of motor vehicle Datsun 160B bearing registration No. BB163. By a policy of motor insurance (commercial vehicle policy No. 5.41.6010.00373.81) dated September 3, 1981 issued by the defendants to Wilco, Wilco was insured against the risks therein specified including liability to third parties.

(2) It was provided in the said policy under the heading "Section II – Liability to Third Parties and Exceptions", *inter alia,* as follows:

> *"Section II – Liability to Third Parties*
>
> The company will subject to the limits of liability indemnify the insured in the event of accident caused by or arising out of the use of the motor vehicle or in connection with the loading or unloading of the motor vehicle against all sums including claimant's costs and expenses which the insured shall become legally liable to pay in respect of –
>
> (a) death of or bodily injury to any person;
>
> (b) damage to property.
>
> *Exceptions to Section II*
>
> The company shall not be liable in respect of –
>
> (i) ...
>
> (ii) death of or bodily injury to any person in the employment of the insured arising out of and in the course of such employment;
>
> (iii) death of or bodily injury to any person (other than passenger carried by reason of or in pursuance of a contract of employment) being carried in or upon entering or getting on to or alighting from the motor vehicle at the time of the occurrence of the event out of which any claim arises."

(3) Wilco are electrical and electronic maintenance contractors specializing in air, sea, navigation and land communication equipment. Their business has been established in Brunei Darussalam since 1979. The business is managed by Mr. William Maddox, the managing director.

(4) At the material time, Wilco had, *inter alia,* an electrical installation contract with Brunei Shell Petroleum (BSP) for a housing project G1-G7, Seria. Wilco rented a house at Seria, Lot 2614, Jalan Makota, for their staff working on this project as a residence. The house at Seria in which the deceased lived was in fact also a place where the deceased and others did a substantial amount of work, including fabricating, painting and testing electrical distribution boxes, and fetching and carrying stores from the house to the site which was about five miles away. Under Wilco's contract with BSP, Wilco had to fabricate to BSP's specifications on these boxes. BSP wanted this so that the distribution boxes were stored on Wilco's premises rather than BSP's own premises.

(5) At or about 0040 hours on September 6, 1982, at Mile 15, Jalan Seria/Tutong, while Galdones was a passenger in vehicle BB163, driven by Guinto, an accident involving BB163 occurred resulting in the death of Galdones and injury to Guinto. No other vehicle or person was involved in the accident. Guinto had a valid driving licence at the material time.

(6) At the time of the accident, the said motor vehicle insurance policy was in force.

(7) The plaintiff, wife of William Maddox and sister of Galdones, commenced proceedings as administratrix of the estate of Galdones on July 27, 1985, in Suit No. 245 of 1985 against Guinto as the servant or agent of Wilco and against Wilco as the owner of vehicle BB163. This claim was for damages for loss of expectation of life under the Law Reform (Miscellaneous Provisions) Act 1934 for the death of Galdones by the negligence of Guinto in the management and driving and use of vehicle BB163 as the servant or agent of Wilco.

(8) Notice under section 9 of the Motor Vehicles Insurance (Third Party Risks) Act (Cap. 90) was duly given to the defendants of the bringing of proceedings by the plaintiff. Notice has been given on behalf of the defendants to Wilco that no liability attached under the said policy.

(9) Judgment in default of defence against Wilco in the said Suit No. 245 of 1985 was sealed and entered on November 21, 1985. Guinto was not served with the writ in the said Suit No. 245 of 1985. Damages were assessed before the Honourable Mr. Justice Hooper on June 5, 1986.

(10) On June 14, 1986, the Honourable Mr. Justice Hooper ordered that Wilco do pay the plaintiff the sum of $159,543.00 [See *Lita Maddox* v. *Calito C. Guinto & Anor.* [1987] 2 M.L.J. 757 with interest and costs, such costs to be taxed if not agreed. Costs was subsequently taxed at $12,648.10 on August 18, 1986. The plaintiff has not received any payment for the judgment sum, interest and costs at all either from Wilco, or the defendants or any other persons.

(11) The plaintiff now brings this action under the Motor Vehicles (Third Party Risks) Act (Cap. 90) to enforce the said order of the Honourable Mr. Justice Hooper against the defendant as insurers of BB163.

Evidence of Mr. Maddox

The plaintiff called only one witness, Mr. William Maddox, managing director, at all material times, of Wilco, the firm which employed the deceased, Galdones, and Guinto. The defendant called no witnesses and relied solely on submissions of law.

Mr. Maddox referred to an affidavit, sworn by him on March 4, 1986, and confirmed that it is true. In that affidavit, he stated that Galdones, his wife's brother, had been engaged by Wilco since July 1980. Because of his close relationship with Galdones, the terms of the latter's employment were not "spelt out in detail", apart from the standard form of conditions of employment required by the Immigration Department.

Galdones was the person who normally drove and looked after BB163, owned by Wilco, though other employees drove it from time to time, on business and on pleasure.

On the evening of Friday, September 3, Galdones and Guinto came in BB163 to Bandar Seri Begawan, where they spent the night with Mr. Maddox, who did not remember where they spent Saturday night.

About 10.00 p.m. on Sunday, September 5, the two men came to his house and said they would like to spend the night at Mr. Maddox's house and leave for Seria early in the morning. Mr. Maddox said that he could not allow this and that they must leave for Seria that evening, "so that they could do the things they would normally have done over the weekend, such as getting their tools and materials ready and studying their drawings in preparation for reporting for duty at 7.00 a.m. on Monday morning. Being my employees, they both, of course, agreed to do what they were told. They left at something like 11.00 p.m."

Mr. Maddox notes, in that affidavit, that he had been advised that Guinto, who was driving the car when the accident occurred, was not driving as servant or agent of Wilco, "because an employee driving to his place of work is not driving on duty".

On December 15, 1984, Mr. Maddox made a statement to a representative of William Miller & Co., in relation to the workman's compensation claim put forward by Mr. Maddox to the defendant.

The relevant passage of this statement, signed by Mr. Maddox, reads, "I instructed both of them to go back to Seria so that they were fresh to work on the next morning".

In a letter written by the firm of advocates and solicitors, then representing Mr. Maddox, dated April 20, 1985, appears the following:

"On Sunday evening, they returned to the Maddox house, expecting to be allowed to spend the night there. Mr. Maddox told them 'no' in no uncertain terms that this was not allowed. They must both return to Seria that evening so that they could commence work at 7.00 a.m. on Monday morning."

In his evidence, Mr. Maddox gave a different version of why he told the two men to return to Seria on the Sunday evening.

"I told them that they had to go back on Sunday night as they had not completed work preparation for Monday morning's scheduled installation of electrical distribution fillers. Therefore, I was sending them to inspect the work which should have been done over the weekend."

He added that he expected them to start work as soon as they got back to Seria and that they would be paid overtime for such work. He sent them back as soon as he discovered that they had not done the preparatory work which had to be done before Monday morning.

During examination-in-chief, Mr. Maddox stated that he did not tell the men that he would pay them from 10.00 p.m., the time they started back to Seria. At the end of his evidence, however, he said that both were to be paid overtime from the time they started to drive back to Seria and that he regarded them as on duty from the time they left his house.

Effect of Mr. Maddox's evidence

It is over four years since the accident, a period during which memory often becomes uncertain.

I do not suggest that Mr. Maddox was giving evidence which he knew to be inaccurate, but, in some respects, I think that his recollection is unreliable.

I do not accept his suggestion that the two men were to be paid overtime from the time they left his house. Apart from his contradictory evidence as to this, it is most unlikely that an employer would undertake, in contradiction of normal practice, to pay two of his workers for the time they took to return to their place of work from a holiday weekend taken by them at their option.

I will accept, not without hesitation, Mr. Maddox's evidence that the men were told to return to Seria to do preparatory work before 0700 the next morning and that they were to be paid overtime for that.

Thus, when they were driving from Bandar Seri Begawan to Seria, they were travelling to work, but were not, at the time of the collision, on duty.

Course of employment

I accept that it is for the defendant to show, having admitted that the deceased would be covered by the relevant policy unless he falls within one of the exceptions contained therein, that he does so fall.

To do so, the defendant must establish either:

(a) that the death of Galdones arose out of and in the course of his employment by Wilco; or

(b) that Galdones was a passenger in the vehicle and that he was not a passenger "carried by reason of or in pursuance of a contract of employment".

The phrase, death or injury "arising out of and in the course of employment" was used in the English Workmen's Compensation Acts which were in force from 1897 to 1945 and in subsequent English Road Traffic Acts. There are thus many reported cases on its interpretation, among them two House of Lords decisions, *St. Helens Colliery Co. Ltd.* v. *Hewitson*[1] and *Weaver* v. *Tredegar Iron and Coal Co. Ltd.*[2]

These cases, according to Lord Denning M.R. in *Vandyke* v. *Fender*,[3]

> "show, to my mind, quite conclusively, that when a man is going to or coming from work, along a public road, in a vehicle provided by his employer, he is not then in the course of his employment, unless he is obliged by the terms of his employment to travel in that vehicle. It is not enough that he should have the right to travel in the vehicle or be permitted to travel in it. He must have an obligation to travel in it."

From these principles, it must follow that the two men, since I have found that they were on their way to work, were not, at the time of the accident, in the course of their employment, unless it can be shown that they were under an obligation to travel to work in it.

Mr. Maddox's evidence was that BB163 was a company car used for various purposes, both company, business and for private use by its employees. He added that "employees were not obliged to use the vehicle but had a choice not to do so".

He agreed, in cross-examination, that BB163 was available and that "they had no choice but to take it as no buses were available".

In the *St. Helen's* case, special trains were provided by the employer to take its workmen to their place of work. It was held that a workman injured in a train accident on his way to work was not in the course of his employment, because he was not obliged to use the train, even though it was provided for his use.

I believe that the situation in this case is analogous. Wilco made the car available for use by Galdones, with other employees, including Guinto. He was not obliged to use it at any time. On the weekend in question, he had made use of it for his private purposes. At the conclusion of the weekend, he would return to work in it.

There is no evidence that Mr. Maddox ordered the deceased to return to work in BB163, and I

find that he did not. He told Galdones to get back to Seria in time to do preparatory work before 0700 the next morning. He did not direct him as to how he got there, no doubt assuming that Galdones would make use of that car, but giving him no direction to that effect.

I find, therefore, that the deceased was *not* acting in the course of his employment when he was killed.

The passenger exclusion

I must now consider the effect of the second exclusion. The evidence establishes that Galdones was being carried as a passenger in the car at the time of his death and that Guinto was driving.

The defendant will be liable under the policy unless it can show that Galdones was not a passenger carried "by reason of or in pursuance of a contract of employment".

The language of this clause was considered by the House of Lords in *Izzard* v. *Universal Insurance Company Ltd.*[4] The deceased, Izzard, met his death while being carried from his house to his work in a lorry owned by Druce, which was insured by the defendant. Izzard was not employed by Druce, but by another firm, IB. It was held, on the facts, that it was a term of Izzard's employment with IB that he should be conveyed to work in a lorry owned by Druce.

Lord Wright commented, at p. 782:

"I cannot accept the respondent's contention that 'contract of employment' should be construed in the Act as subject to the implied limitation 'with the person insured by the policy'. Such a departure from the clear language used cannot, I think, be justified. I think the Act is dealing with persons who are the insured vehicle for sufficient practical or business reasons and has taken a contract of employment in pursuance of which they are in the vehicle as the adequate criterion of such reasons. But there is no sufficient ground for holding that this item should be limited to employees of the insured person. Such employees, if injured or killed, would normally fall under exception (i), though I am not prepared to say that there might not be in certain events an employee of the insured who could claim as a passenger. But such cases must be rare. The most probable case is where the man killed or injured was in the vehicle in pursuance of a contract not with the owner of the vehicle but with someone else, for instance with the person whose goods are being carried on the vehicle: thus a commercial vehicle carrying a contractor's or merchant's goods would frequently and perhaps even normally have on it an employee of the goods' owner to see to loading or unloading or delivering the goods or caring for them in transit."

From this statement, I derive the following:

(a) that if the deceased was carried in the vehicle in the course of his employment, he is excluded under exception (ii);

(b) if the deceased was carried as a passenger in his employer's vehicle, the latter's insurer *may* be liable if he is being carried "by reason of or in pursuance of a contract of employment", but that such cases will be rare.

The effect of *Izzard* has been examined in various cases, among them *Tan Keng Hong* v. *New India Assurance Co. Ltd.*[5] The deceased, a forester, had obtained a free lift on the lorry. The insurers were held not to be liable, there being no provision in the forester's contract of employment for the acceptance of lifts by him for his convenience.

Lord Salmon observed at p. 981:

"Whether a passenger is carried by reason of or in pursuance of a contract of employment within the meaning of exception (iii) depends solely upon the terms of the passenger's employment. In the present case, there is no term of the forester's contract of employment, express or implied, which 'required or entitled him' to travel on the lorry."

Reference does not seem to have been made in *Tang Keng Hong* to *Vandyke* v. *Fender.*[3] The plaintiff and the defendant were both workers for the same employer, who provided a car, plus petrol for it, so that Vandyke or Fender, taking it in turns, could drive to and from work. Vandyke was injured through the negligent driving of Fender. Vandyke was not obliged to travel in the car.

The Court of Appeal ruled that the plaintiff was, at the relevant time, a passenger in the car "by reason of his contract of employment", although it also found that Vandyke was not injured in the course of his employment.

Lord Denning (at p. 306B) observed:

"I think that passengers are carried in a vehicle by reason of a contract of employment whenever such a contract is a cause or one of the causes of their being carried."

Lord Sachs (at p. 308) commented:

"The relevant phrase is not coterminous with 'arising out of and in the course of his employment' as used earlier in section 203(4). By reason of his employment embraces a wider category of employees. The essence of the test formulated in the speech of Lord Wright in *Izzard* v. *Universal Insurance Co. Ltd.* was whether the passenger was being carried for sufficient practical or business reasons."

In *Nottingham* v. *Aldridge & Anor.*[6] the plaintiff (N) was injured in a van driven by Aldridge (A) and owned by A's father. Both N and A were attending a residential course as required by their employer. A had given a lift to N. He knew that he (A) was entitled to claim a mileage allowance from his employer for carrying N.

Eveleigh J. approached and question of whether exclusion (iii) applied by accepting that the contract of employment referred to in the policy must be that of the passenger, not the driver. This is of some importance in this case, since the evidence is that the deceased had a right to use the car, whereas I have no evidence as to the extent to which Guinto was permitted to do so.

The judge, having found that N was *travelling* to his place of work "by virtue of his contract of employment", considered if he was being *carried* there by reason of his contract of employment, and decided that he was because the employer had undertaken to finance the carrying of his employees to work and that this was why A was carrying N.

I do not find the last case of great assistance, since it must be held to have been decided on its own unusual facts, the principal ground being that the employer had agreed to pay the cost of transporting the injured person to his work, so that he was travelling by that method by reason of his contract of employment.

Care must be taken not to interpret exception (iii) in such a manner as to nullify exception (ii). If the insurer is not liable because the deceased was acting in the course of his employment, a narrow meaning must be given to the phrase "by reason of or in pursuance of a contract of employment", since, in the widest sense, the latter phrase would comprehend the former.

Thus the exception to exception (iii) should, in my view, be given a restricted meaning, so that, if a person is killed, when not acting in the course of his employment, it will be very rare, as Lord Wright observes, for him to be found to have been killed by reason of or in pursuance of a contract of employment.

I can reconcile these cases only on the basis that if the deceased was obliged by his contract of employment to travel in the vehicle in which he was killed, on his way to work, he is acting in the course of his employment. But if he was entitled or eligible to make use of that vehicle, in which he is travelling as a passenger when killed, it is open to the court to find that he was so travelling by reason of his contract of employment, even though not in the course of his employment.

I reach this conclusion with some difficulty, in view of *Izzard*, though I note that Lord Wright noted that, in some circumstances, an employee of the assured might be able to claim as passenger.

The evidence is that Galdones had a right to use the vehicle as he wished, that it was in his charge and that other employees had to ask his permission to use it. This valuable benefit was part of Galdones' terms of service with Wilco.

I think, therefore, that Galdones' contract gave him a right to travel in the vehicle concerned, whether as driver or passenger, save on those occasions when the business needs of Wilco overrode this right.

On the evening in question, he was exercising his right even though, as I have found, he was not obliged to make use of the car.

Thus the facts of this case, as I have found them, fail into the narrow band of circumstances in which an employee, though not acting in the course of his employment, is nevertheless acting by reason of his contract of employment.

This seems to me to be a somewhat forced distinction, the product perhaps of cases in which the courts were swayed more by sympathy than by logic. Nevertheless, this is where the authorities lead me. Accordingly, I must find that the deceased fell within the bracketed exception to exclusion (iii), so that the defendant is not relieved of liability thereby.

In the result, I find that the defendant's liability under the policy with Wilco to indemnify the latter is not excluded by either of the exceptions to section II of the contract.

There must be judgment for the plaintiff for $172,191.10 plus interest at 6% from the date of death until today, with costs.

Costs to be taxed if not agreed.

Order accordingly.

Solicitors: *Choo Chan & Wong; Hilborne, Hawkin & Co.*